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Supreme Court, U.S.
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No. 01-178

IN THE

Supreme Court of the United States

TRIGEN-OKLAHOMA CITY ENERGY CORPORATION,

Petitioner,

v.

OKLAHOMA GAS & ELECTRIC COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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October 9, 2001

H7P

QUESTION PRESENTED

Whether a state-regulated private utility enjoys state-action immunity from antitrust liability for its monopolization of an unregulated market by means of non-price anti-competitive conduct neither approved nor supervised by the State.

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REPLY BRIEF IN SUPPORT OF PETITION FOR *CERTIORARI*

The decision below holds that if a utility's rates are regulated, it is immune from antitrust liability, even if the particular anti-competitive conduct challenged is non-price predation neither authorized nor supervised by the State. This decision extends private-party immunity far beyond what this Court's precedents countenance, and it comes at a critical time of transition when market-power concerns in many industries are heightened and the need for vigorous antitrust enforcement is correspondingly great. *See* Pet. 8-12; Brief of *Amici Curiae* National Energy Marketers Ass'n, et al. 2-8; Brief of *Amici Curiae* United States Combined Heat and Power Ass'n, et al. 1-4, 9-12. By basing immunity on status rather than conduct, the decision below will sow confusion and frustrate the States' ability to protect their citizens. By raising a litany of unrelated issues and failing to face the question presented, respondent OG&E's brief in opposition further underscores the need for review.

OG&E's brief in opposition cannot obscure the reality that the decision below departed from this Court's precedents by conferring blanket immunity based on OG&E's status as a regulated utility, despite the fact that Oklahoma neither authorized nor supervised the anti-competitive conduct at issue. OG&E does not contend that Oklahoma clearly authorized or actively supervised the *non-price* predatory conduct for which the jury found OG&E liable, including misrepresentations, contractual interference, and improper payments. Rather than meet the question presented, OG&E attempts to change the subject.

First, in its defense of the Tenth Circuit's state-action immunity holding, OG&E proceeds as if the jury found it liable for charging predatory *rates*. This is mere evasion; Trigen does not challenge any of OG&E's rates. Second, even though the decision below rested entirely on state-action immunity, much of OG&E's opposition does not

address this issue at all but rather reargues the weight of the evidence and complains of trial rulings on other issues. OG&E distorts the record and misstates the law on these new issues, but that ultimately is beside the point, for OG&E offers no support for its suggestion that this Court reach out to resolve these fact-dependent issues in the first instance. OG&E's inability to face the question actually presented testifies powerfully to the need for review.

1. OG&E does not dispute that, under this Court's precedents, a private party is not immune unless its "*particular anticompetitive conduct at issue*" was both clearly authorized and actively supervised by the State. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992) (emphasis added). Our petition described OG&E's "extensive and varied non-price predatory conduct" in furtherance of its Plan of Action to "remove customers from Trigen." Pet. 2-3. The petition made crystal clear that Trigen did not and does not claim that OG&E's *rates* are predatory. Pet. 1-4; *see also* 10th Cir. App. vol. I at 36-41 (amended complaint).[1] And the petition explained that the Tenth Circuit adopted an unprecedented status-based immunity by holding that "[a]s a state-regulated electric utility, OG&E has clearly met the two-prong test for state action immunity," Pet. App. 9a, even though the court did not and could not find that the challenged non-price predatory conduct was authorized or supervised by Oklahoma.

a. Precluded by the record from contending that Oklahoma authorized or supervised the non-price conduct

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[1] Trigen's claims concerning the County and Corporate Tower do not involve OG&E's rates even in passing. One aspect of Trigen's claim concerning Oklahoma City is OG&E's misrepresentation of the benefits that the City would obtain with OG&E's RTP tariff, but this claim in no way challenges the RTP tariff itself. Trigen's claim is not that the RTP tariff is predatory, but the opposite: that because OG&E could not win the competition for the City on the basis of price, OG&E resorted to misrepresentations and other non-price predation. *See also* Pet. 4 & n.3.

that Trigen challenges here, OG&E has rewritten Trigen's complaint as a challenge to OG&E's rates. Thus OG&E attributes to Trigen an "assertion that the OCC does not actively supervise OG&E's rates." Opp. 14. Trigen has made no such assertion. For this reason, OG&E's detour into the 1996-97 OCC proceedings is irrelevant. Whether or not these proceedings show that the OCC's review of OG&E's rates is "detailed, deliberate and judicious," Opp. 12, these rate proceedings plainly cannot show that Oklahoma clearly authorized and actively supervised the non-price conduct at issue in this case.

OG&E's account of these OCC proceedings also is incorrect. OG&E claims that the OCC's February 11, 1997 Order "specifically rejected Trigen's position on the RTP tariffs." Opp. 13. The Order did no such thing -- it involved unrelated issues and did not even mention the RTP tariff.[2]

b. When OG&E does not misdirect the Court's attention to its rates, it offers vague and unsupported assertions that the court below correctly found that Oklahoma supervises "OG&E" (Opp. 15), "OG&E's activities" (Opp. 15, 17), or "OG&E's conduct" (Opp. 7). These empty generalities cannot come close to satisfying this Court's private-party immunity precedents. As our petition explained, "[n]o one

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[2] This Order is reprinted at App. 1a, *infra*. OG&E's statement that "the OCC considered and rejected Trigen's similar allegations" in the 1996-97 proceedings is equally disingenuous. In the OCC, contrary to its position in the court below, OG&E argued successfully that "the Commission is without jurisdiction to determine or adjudicate the private dispute between Trigen and OG&E now pending in the federal District Court, and the Commission is equally without jurisdiction to entertain allegations of anticompetitive practices which might occur now or in the future." OG&E Mot. in Limine (filed Jan. 17, 1997) (reprinted at App. 21a, 28a, *infra*); *compare* Pet. App. 13a-14a (holding below that the OCC has exclusive jurisdiction over Trigen's state-law antitrust and tort claims). In addition, any implication that Trigen settled its claims in the Settlement Agreement approved by the OCC on February 11, 1997 is untrue; Trigen was not a party to that Agreement. *See* App. 9a, *infra*.

disputes that the OCC 'supervises OG&E,' [Pet. App. 10a], to some extent and in some respects. The relevant question under this Court's precedents, however, is whether 'the particular anticompetitive conduct at issue . . . [was] supervised by governmental actors.'" Pet. 15 (quoting *Ticor*, 504 U.S. at 634). OG&E, like the Tenth Circuit, conspicuously fails to address that critical question.[3]

c. Although OG&E disclaims any blanket, status-based immunity and describes the decision below as "unremarkable," Opp. 7, 10-11, this description does not withstand examination. First, OG&E embraces the holding below that its "alleged 'bad acts'" could not "somehow destroy" its immunity. Opp. 18-19. Under *Ticor*, however, not even a regulated utility has immunity "in the air," divorced from an analysis of the State's involvement in the "bad acts" at issue. OG&E offers no response at all to our explanation of the Tenth Circuit's error in beginning from a premise -- indeed, a seemingly conclusive presumption -- of blanket immunity for regulated utilities. *See* Pet. 17.

OG&E likewise embraces the holding below that because "OG&E is *selling* only one thing -- electricity at state-regulated rates," it is immune for any and all *conduct*. Pet. App. 11a (emphasis added). OG&E does not dispute that it would be subject to "antitrust standards" under *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596 (1976), if it "engage[d] in business activity in [a] competitive area[ ] of the economy." *See* Opp. 16-17. But OG&E contends that it

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[3] Citing *DFW Metro Line Servs. v. Southwestern Bell Tel. Corp.*, 988 F.2d 601 (5th Cir. 1993), OG&E chides Trigen (Opp. 15) for supposedly making the "'ludicrous'" argument that "the OCC does not actively supervise OG&E." The very sentence quoted by OG&E, however, demonstrates that the *DFW* court analyzed whether the State supervised "the conduct in question," 988 F.2d at 607, not merely whether it supervised "the defendant." Because the plaintiff challenged the rates that the defendant charged it and those rates were actively supervised, the court held that the defendant was immune for the conduct in question. *See id.* at 605-07.

could not have been so engaged, because it "was only attempting to market and sell one product, electricity." *Id.*

There can be no mistaking the import of the Tenth Circuit's holding. Every electric utility sells electricity at regulated rates. If an electric utility's sales at regulated rates immunized anything and everything that the utility might do, then every electric utility would enjoy a blanket immunity based on its status "[a]s a state-regulated utility," Pet. App. 9a. Such a result would make nonsense of this Court's admonition that "there can be no doubt about the proposition that the federal antitrust laws are applicable to electrical utilities." *Cantor,* 428 U.S. at 596 n.35 (citing *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973)); *accord, e.g., Town of Concord v. Boston Edison Co.,* 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, C.J.) ("Even though Boston Edison is a regulated firm, it has no blanket immunity from antitrust laws.").

The court below also ignored the record in holding that OG&E could not be "engage[d] in business activity in [a] competitive area[ ] of the economy" under *Cantor* because it sells only electricity, *see* Pet. App. 11a-12a, and OG&E ignores the record in defending that holding. Most obviously, OG&E conceded that "Trigen and OG&E are direct and substantial competitors." OG&E 10th Cir. Br. 9. Even without that concession, it would be difficult to understand why OG&E implemented a "Plan of Action" to "remove customers from Trigen" if OG&E was not engaged in a competitive area of the economy.

OG&E disputes Trigen's definition of the relevant market as the market for cooling services, and asserts that the Tenth Circuit rejected that definition. *See* Opp. 6, 8, 24-25. It is unclear whether OG&E means to defend the holding below that OG&E is immune because it was not engaged in a competitive area of the economy, or to raise a separate challenge to the verdict. OG&E is wrong regardless.

First, as our petition explained, immunity attaches to *conduct*, not to markets or products. Because Oklahoma did not clearly authorize or actively supervise OG&E's conduct challenged here, OG&E is not immune. The proper market definition might relate to other issues under § 2 of the Sherman Act, but it does not determine whether OG&E is immune. *See* Pet. 19-20. Accordingly, even if the Tenth Circuit had held that the jury's market-definition finding was not supported by the evidence, such a conclusion would not have justified the court's holding that OG&E was immune.

Second, contrary to OG&E's assertions, the Tenth Circuit did not purport to reject the jury's market-definition finding. The court did not mention the jury's finding or the standard of review under Fed. R. Civ. P. 50, *see* Pet. 18-19, and properly so: the evidence abundantly supported the jury's finding.[4] Rather, the court appears to have held that OG&E could not have been participating in the competitive cooling-services market for purposes of *Cantor* because it does not sell chillers. As explained above, this holding cannot be reconciled with the record, and it in any event misconceives the immunity inquiry by focusing on what products OG&E was selling rather than on whether the State authorized and supervised OG&E's conduct at issue.[5]

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[4] OG&E's parade of horribles (Opp. 24) ignores that (1) the jury heard *evidence* demonstrating that consumers perceived OG&E and Trigen as the only real alternatives for cooling services, and that the cost of the additional input of a chiller did not significantly affect their choice, 10th Cir. App. vol. IX at 2304-36, 2349-59, 2408-13; (2) OG&E opted not to offer any evidence on this issue; and (3) products and services need only be reasonably interchangeable, and not technologically identical, to be in the same market, Pet. 19-21 & n.16; *see also* Brief of *Amici Curiae* United States Combined Heat and Power Ass'n, et al. 7-9.

[5] OG&E also argues (Opp. 19-20) that because a municipality's anti-competitive conduct can be immune even if not actively supervised by the State, its conduct directed at municipalities should be immune without any supervision. OG&E cites *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), but ignores that the Court took pains to

2. a. Much of OG&E's opposition does not defend the state-action immunity holding below at all, but argues that OG&E should prevail on other grounds. In the first place, as arguments against *certiorari*, these arguments are baffling. Just as in *Ticor,* the decision below rested solely on state-action immunity grounds, and it therefore squarely presents the question addressed by our petition.[6] The prospect that the respondent might prevail on other grounds on remand is as beside the point here as it was in *Ticor*. *See also Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129 (3d Cir. 1993) (considering McCarran-Ferguson Act and *Noerr* arguments on remand from this Court). Moreover, to the extent that OG&E suggests that *this Court* should reach these new

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distinguish private parties from municipalities: "We may presume, absent a showing to the contrary, that the municipality acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." *Id.* at 45 (footnote omitted). Moreover, OG&E errs in accusing Trigen of "attempt[ing] to veto government action." Opp. 20. Trigen sued OG&E because OG&E -- and not the County or City -- implemented a predatory Plan of Action to remove customers from Trigen and monopolize the cooling-services market. In any event, because Oklahoma did not clearly authorize OG&E's non-price predation, OG&E would not be immune even if (contrary to fact) no supervision requirement applied. *See* Pet. 16.

[6] *Compare* Pet. App. 6a ("Because we hold that the state action doctrine mandates the dismissal of the federal antitrust claims . . . we decline to reach the *Noerr-Pennington* and filed rate doctrine defenses. Nor is it necessary to address OG&E's arguments concerning reversible error at trial . . . .") *with Ticor Title Ins. Co. v. FTC*, 922 F.2d 1122, 1140 n.17 (3d Cir. 1991) ("Because we hold that Ticor's setting of collective rates . . . is immune from antitrust liability under the state action doctrine, it is unnecessary to consider whether the same activity is also exempt from antitrust regulation under the McCarran-Ferguson Act . . . [or] the *Noerr-Pennington* doctrine."). OG&E's claim that the Tenth Circuit "did address several key elements of these other grounds," Opp. 21, is unfounded. The decision below did not reach in any manner OG&E's *Noerr*, filed-rate, or antitrust injury arguments, OG&E's challenge to the jury's finding of anti-competitive conduct, or OG&E's complaints about the jury instructions or the district judge's evidentiary rulings.

issues in order to affirm the judgment below on other grounds, *see* Opp. i, that suggestion ignores this Court's practice. *See, e.g., National Collegiate Athletic Ass'n v. Smith,* 525 U.S. 459, 470 (1999) ("we do not decide in the first instance issues not decided below"). OG&E offers no reason why this Court should depart from its usual practice by reaching out to resolve these fact-intensive issues.

b. OG&E's arguments on these new issues are meritless in any event. Because these arguments are beside the point as just explained, and because Trigen's briefs in the court below respond fully to them, we point out here only a few of OG&E's errors.

First, OG&E maintains that what it light-handedly terms its "marketing and sales efforts" (Opp. 18 n.9) were innocuous and not anti-competitive as required by § 2. *See also* Opp. 8-9, 25-26. But in offering a selective and tendentious account of its conduct, *see, e.g.,* Opp. 18 n.9, OG&E forgets that, as the verdict-loser, the record must be viewed in the light least favorable to it. *See, e.g., Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.,* 121 S.Ct. 1776, 1779 (2001); *Patrick v. Burget,* 486 U.S. 94, 98 n.3 (1988); *cf. Major League Baseball Players Ass'n v. Garvey,* 121 S.Ct. 1724 (2001) (per curiam). For example, OG&E fails to explain how its method of "Trigen competition" -- paying $138,000 for no apparent work to the son of a county commissioner whose vote OG&E needed -- qualifies as "competition based on price and service," Opp. 3 n.1. Nor does OG&E explain what misrepresentations, interference with contract, and wining and dining public officials have to do with "competition's basic goals -- lower prices, better products, and more efficient production methods." *Town of Concord,* 915 F.2d at 22; *see also* Pet. 2-3 & n.1.

Second, in its argument based on the filed-rate doctrine, OG&E again quarrels with the verdict, dismissing what the jury must be presumed to have found was a misrepresentation as merely an "incorrect estimate[ ]," and

seeking to shift the blame to its "consultants." Opp. 23. OG&E also misstates the law. This Court has *not* held that "[t]he filed-rate doctrine bars any suit based on incorrect estimates of a tariffed service, 'even if a carrier intentionally misrepresents its rate.'" *Id.* (quoting *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998)). This Court's statement, when quoted in full, makes clear that *Central Office* bars a suit to *enforce* a promised rate that differs from the filed rate: "Thus, even if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff." 524 U.S. at 222. The jury did not order OG&E to charge Trigen a non-filed rate, and it did not award Trigen a refund of the difference between any promised non-filed rate and OG&E's filed rates. Instead, the jury awarded Trigen the profits that it lost because of (among many other things) OG&E's misrepresentations to the City of the average cost that it would obtain using the RTP tariff. *See also supra* at 2 n.1. The filed-rate doctrine has no application here. *See, e.g., In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1159 (3d Cir. 1993) (filed-rate doctrine "does not preclude liability based on non-rate anticompetitive activity").

Third, OG&E's claim of *Noerr* immunity is misplaced as well. The *Noerr* doctrine is an interpretation of the Sherman Act designed to avoid penalizing citizens for exercising their right to "petition the Government for a redress of grievances." U.S. Const. amend. I. The Petition Clause, however, does not guarantee a right to wine and dine government purchasing agents. As this Court emphasized in *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 707-08 (1962), when a company is "engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws," applying the Sherman Act does not "remotely infringe upon any of the constitutionally protected freedoms spoken of in *Noerr*."

Extending *Noerr* immunity to OG&E's purely commercial activity would remove government contracting from the coverage of the antitrust laws. Moreover, *Noerr* protects efforts to procure legislation that permits activity that otherwise would be unlawful; it does not protect activity that otherwise is unlawful just because that activity is directed at a government. *See, e.g., FTC v. Superior Court Trial Lawyers Ass'n,* 493 U.S. 411, 424-25 (1990); *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.,* 382 U.S. 172, 177 (1965). Accordingly, OG&E did not immunize its predatory conduct by including governments among its targets.

CONCLUSION

For the reasons stated herein and in Trigen's petition, *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF OKLAHOMA GAS AND ELECTRIC COMPANY FOR AN ORDER OF THE COMMISSION AUTHORIZING APPLICANT TO MODIFY ITS RATES, CHARGES AND TARIFFS FOR RETAIL ELECTRIC SERVICE IN OKLAHOMA	)))))))))	CAUSE NO. PUD 960000116 ORDER NO. 409383

Hearings: May 16, June 17, July 11, 25, August 8, 29, September 5, 12, 19, 26, 30, October 10, 11, 17, 21, 24, 31, and November 7, 13, 14, 21, 22, 1996 before the Administrative Law Judge;

November 22, 25, December 16, 18, 1996, and January 6, 13, 14, 15, 16, 21, 22, 23, 1997 before the Commission *en banc*.

Appearances: H.D. Binns, Jr., Robert D. Stewart, Jr., Diane S. Goldschmidt, and John W. Harbour, Jr., Attorneys for Oklahoma Gas and Electric Company;

Maribeth D. Snapp, Andrea P. Johnson, Cece Wood, and Jacqueline T. Miller, Attorneys for the Public Utility Division, Oklahoma Corporation Commission;

Rick D. Chamberlain and Mickey S. Moon, Attorneys for the Attorney General of the State of Oklahoma;

William J. Bullard and Kimberly K. Blaylock, Attorneys for the Oklahoma Industrial Energy Consumers and Air Liquide America Corporation;

J. Fred Gist, James D. Satrom, and G. Dean Luthey, Jr., Attorneys for Terra International (Oklahoma), Inc.;

George M. Makohin, Attorney for GPM Gas Corporation;

John A. Gaberino, Jr., Robert A. Huffman, Jr., and Vivian C. Hale, Attorneys for Oklahoma Natural Gas Company/ONG Transmission Company;

D. Kent Meyers, Robert E. Bacharach, Bernays T. Barclay, and Erik J. Swenson, Attorneys for Trigen-Oklahoma Energy Corporation;

John J. Breathwit and Babette Patton, Attorneys for The PowerSmith Cogeneration Project;

Cody B. Waddell, Attorney for the Commission on Marginally Producing Oil and Gas Wells;

Richard R. Wilfong, Attorney for Oklahoma Gas and Electric Company's Shareholders' Association;

W. Bland Williamson, Steven J. Goetziinger, Henry A. Meyer, III, and John J. Randolph, Attorneys for Oklahoma Independent Petroleum Association;

John Lovett and Brent B. Moore, Attorneys for Oklahoma Mid-Continent Oil and Gas Association;

Cheryl A. Vaught, Attorney for Mid-Continent Power Company, Inc.; and

Thomas F. Golden and William R. Burkett, Attorneys for AES Shady Point, Inc.

ORDER APPROVING JOINT STIPULATION AND SETTLEMENT AGREEMENT

BY THE COMMISSION:

The Corporation Commission of the State of Oklahoma ("Commission") being regularly in session and the undersigned Commissioners being present and participating, the Joint Stipulation and Settlement Agreement made and executed by Oklahoma Gas and Electric Company ("OG&E" or "Applicant" or "Company"), the Public Utility Division of the Oklahoma Corporation Commission ("Staff"), the Attorney General for the State of Oklahoma ("AG"), the Oklahoma Industrial Energy Consumers ("OIEC"), Terra International (Oklahoma), Inc. ("Terra"), Air Liquide

America Corporation ("Air Liquide"), The PowerSmith Cogeneration Project ("PowerSmith"), the Commission on Marginally Producing Oil and Gas Wells ("Marginal Well Commission"), Oklahoma Gas and Electric Company's Shareholders' Association ("Shareholders"), the Oklahoma Independent Petroleum Association ("OIPA"), Mid-Continent Power Company ("MCPC"), Oklahoma Mid-Continent Oil & Gas Association ("CO&G"), and AES Shady Point, Inc. ("AES"), all hereinafter collectively referred to as the "Stipulating Parties," comes on for consideration. A copy of the Joint Stipulation and Settlement Agreement (hereinafter referred to as the "Stipulation") is attached hereto as "Attachment A" and incorporated herein by reference.

PROCEDURAL HISTORY AND SUMMARY OF THE EVIDENCE

On May 2, 1996, OG&E filed its Notice of Intent with attached exhibits indicating the Company's intent to file for rate review in accordance with the Commission's Rules (OAC 165:70). The Attorney General of the State of Oklahoma filed a Motion to Intervene on May 10, and that Motion was granted May 21, 1996, by Commission Order No. 402038. On June 12, the Company filed its Motion for Protective Order.

One June 17, 1996, OG&E filed with the Commission an Application seeking to reduce its Oklahoma jurisdictional gross annual revenues, exclusive of gross receipts or franchise taxes, in the amount of $14.2 million effective with its first billing period in the month of March, 1997. Concurrently with the filing of the Application, the Company filed its Application Package comprising the Minimum Standard Filing Requirements as required by OAC 165:70. Contained in the Application Package, consisting of two

volumes,[1] OG&E submitted the prefiled testimony of Mr. James R. Hatfield, Mr. William D. Steinmeier, Mr. Charles A. Benore, Mr. Don L. Young, Mr. Jack T. Coffman, Mr. Byron F. Johnson, Mr. John Gunesh, and Mr. William L. Wylie, along with schedules and exhibits for the test year ending December 31, 1995, reflecting Oklahoma jurisdictional operational *pro forma* revenues of $1,011,873,001. Based upon the *pro forma* adjusted test year as reflected in the Company's exhibits, OG&E requested in its Application that its *pro forma* Oklahoma jurisdictional revenues be reduced by $14,209,880 effective with the first billing cycle in the revenue month of March 1997.

The Commission granted OG&E's request for protective order by issuing Order No. 402839 on June 24, and attached a Proprietary Agreement form for the use of the parties in this proceeding. On July 3, the OIEC and Terra filed motions to intervene, and on July 8, 1996, the Staff filed its statement reflecting substantial compliance with OAC 165:70 by the Applicant with respect to the Application Package submitted and filed with the Commission. GPM filed its Motion to Intervene on July 16, and July 17, 1996, the Commission issued Orders Numbered 403464 and 403465 which respectively set the hearing on the merits of this cause before the Commission *en banc* and granted intervenor status in this proceeding to Terra and OIEC. On July 24, 1996, Trigen filed its Motion to Intervene. On July 30, the Commission entered Order No. 403870 granting GPM's Motion to Intervene, and on August 14, the Commission entered Order No. 404252 granting Trigen's Motion to Intervene.

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[1] Volume I containing the Application and the prefiled testimony of all OG&E's witnesses supporting Applicant's direct case was received in evidence as Exhibit 8; Volume II containing Company's Test Year schedules and exhibits supporting the requested rate reduction was received in evidence as Exhibit 9.

On August 23, 1996, Air Liquide and ONG filed Motions to Intervene, and on August 29, the Marginal Well Commission filed its Motion to Intervene in this proceeding. On September 6, 1996, PowerSmith filed its motion seeking intervenor status, and on the same date the Commission issued Order No. 404968 granting Air Liquide's and ONG's Motions to Intervene. Thereafter, on September 10, the Commission granted intervenor status to the Marginal Well Commission by Order No. 405042. On September 11, the Shareholders filed its Motion to Intervene, and on the following day the OIPA moved to intervene in the case. GPM filed its list of major issues in this case on September 13; Staff and ONG filed their lists of major issues on September 17; Terra, Air Liquide, and OEIC filed their lists of major issues on September 18; and the AG and the Marginal Well Commission filed their lists of major issues on September 19. MCPC and CO&G filed motions to intervene on September 20. The Commission granted OIPA's Motion to Intervene by Order No. 405461 issued on September 24. On October 2, AES filed its Motion to Intervene. The Shareholders were granted intervenor status on October 3, 1996, by Order No. 405736.

The Commission issued its Scheduling Order for this proceeding in its Order No. 405789 on October 4, 1996, and on October 14, 1996, Staff, the AG, OIEC, and Terra filed responsive testimony addressing Applicant's revenue requirement. Staff filed exhibits supporting its position[2] and prefiled responsive testimony of B. Aurobindo, David Dorsey, Malini Ghandi, Glen Gregory, Susan Hayes, David Jones, George Kiser, Larry Manning, George Mathai, Michael Read, G. David Scalf, Vibha Thacker, Steve Wilt, and Miranda Xing. The AG filed prefiled responsive

[2] Staff Accounting Exhibit was admitted in evidence as Exhibit 94 and an amendment thereto was admitted in evidence as Exhibit 134.

testimony of Michael Brosch[3] and Steve Carver along with exhibits supporting their position; OIEC filed prefiled responsive testimony of Mark Garrett, Michael Gorman, and James Selecky; Shareholders filed prefiled testimony and exhibits of Donald A. Murray; and Terra filed prefiled testimony and exhibits of Douglas Burton. On October 15, 1996, statements of position were filed by ONG, Air Liquide, and Trigen. Thereafter, on October 21, 1996, pursuant to the Scheduling Order, Staff, the AG, OIEC, Terra, GPM, and the Marginal Well Commission filed responsive testimony addressing issues other than Applicant's revenue requirement. In that connection, Staff filed prefiled testimony of David Brammer,[4] Lynn Ferry, and Kenneth Zimmerman; the AG filed additional prefiled testimony of Michael Brosch; OIEC filed additional testimony of James Selecky; Terra filed additional testimony of Douglas Burton; GPM filed testimony of John F. Brown;[5] and the Marginal Well Commission filed testimony of A.M. Alloway. On October 29, OIPA filed prefiled responsive testimony of Mickey Thompson, and on October 31, 1996, Staff Witness Ferry filed prefiled testimony amending her previously filed testimony.

The Commission issued its Notice of Hearing[6] on October 28, 1996, setting the hearing on the merits in this case before the Commission *en banc* to commence on November 22, 1996, and on November 20, 1996, Proof of

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[3] Portions of Mr. Brosch's prefiled testimony were admitted in evidence as Exhibits 346, 347 and 348.

[4] Direct testimony admitted in evidence as Exhibit 135 and Amended testimony admitted as Exhibit 197.

[5] Admitted in evidence as Exhibit 139.

[6] Exhibit 157 in the record of this cause.

Publication[7] of the Notice of Hearing and the Affidavit of Publication[8] of the Notice of Hearing were filed by the Tulsa World and by The Daily Oklahoman, respectively. In addition, the Company gave actual notice of the hearing to be conducted by the Commission to all of its Oklahoma jurisdictional customers through a bill insert[9] in compliance with the Commission's Notice of Hearing.

The Company filed prefiled rebuttal testimony of its witness, Mr. William Steinmeier, on November 5, and on November 6, 1996, OG&E prefiled rebuttal testimony and exhibits of Mr. Martin Blake, Mr. Mike Davis, Dr. Jay Lukens,[10] Mr. Don Rowlett,[11] and of all remaining witnesses who filed testimony in support of Applicant's request for rate reduction. In further compliance with the Scheduling Order, on November 18, 1996, the parties to this proceeding filed and exchanged summaries of all testimony filed and those parties not presenting witnesses in support of their position were given an opportunity to file statements of positions.

This cause came on for hearing before the Commission *en banc* on November 22, 1996, as specified in the Notice of Hearing, and with all parties present and participating, the hearing on the merits was continued on the record to 1:30 p.m. on November 25, 1996, to give the parties additional time to negotiate a settlement of the issues related to the Application filed herein. Thereafter, on November 25, 1996, with all parties present and participating, the Stipulating Parties, as identified in the Stipulation attached hereto as Attachment A, announced a settlement in principle of most

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[7] Exhibit 276 in the record of this cause.

[8] Exhibit 275 in the record of this cause.

[9] Exhibit 345 in the record of this cause.

[10] Exhibit 187 in the record of this cause.

[11] Exhibit 188 in the record of this cause.

of the issues in this proceeding. The Commission thereupon continued this cause to 9:00 a.m. on December 16, 1996, to give the Stipulating Parties an opportunity to prepare and file the Joint Stipulation and Settlement Agreement. On December 16, 1996, this cause came on for hearing and the parties announced that thirteen of the sixteen participants in this cause had reached a settlement and compromise of all issues, and this matter was continued to December 17, 1996 at 1:30 p.m. to allow the stipulating parties an opportunity to execute a settlement document. On December 17, 1996, the stipulating parties confirmed their acceptance of the settlement and advised the Commission that a majority of the stipulating parties had executed the Joint Stipulation and Settlement Agreement. The non-stipulating parties[12] advised the Commission that they had been unsuccessful in reaching a settlement with all of the stipulating parties, and this matter was continued to January 6, 1997, at 9:30 a.m. for further proceedings.

On January 2, 1997, the executed Joint Stipulation and Settlement Agreement[13] ("Stipulation") was filed with the Commission, and on January 6, 1997, this cause come on for hearing before the Commission as scheduled. At that time the Commission determined that a hearing should be had to determine whether the Stipulation should be accepted by the Commission and to give the non-stipulating parties an opportunity to present their objections to the Stipulation as filed. To those ends this cause was continued, to be reconvened at 9:30 a.m. on January 13, 1997, before the Commission. At the appointed time on January 13, 1997, the hearing on the merits with respect to the Stipulation was commenced and continued through January 16, 1997. The hearing on the merits resumed on January 21, 1997, pursuant

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[12] ONG, GPM and Trigen.

[13] Exhibit 320 in the record of this cause, incorporated herein as Attachment "A".

to the Order of the Commission and continued through January 23, 1997, at which time the Commissioners voted unanimously to adopt the Stipulation as submitted and directed the Office of General Counsel to prepare a Final Order for the Commission to enter in this cause.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the Commission's review and evaluation of the pleadings, testimony of witnesses, the Stipulation, and evidence contained in the record for this case, and upon full and final consideration thereof, the Commission makes the following findings and conclusions:

The Commission finds that it has jurisdiction with respect to the issues raised by the Application filed herein by virtue of Article IX, Sections 18 and following of the Constitution of the State of Oklahoma, 17 O.S. §151 *et seq.*, OAC 165:5-7-61, and OAC 165:70-3-1 *et seq.* The Commission further finds that notice was given and made of these proceedings as required by law and the Notice of Hearing issued by the Commission herein, by publication and by actual notice to all of Applicant's Oklahoma jurisdictional customers.

The Commission finds that the position taken by ONG and GPM in this proceeding should be rejected. ONG and GPM urged the Commission to require OG&E to implement competitive bidding for natural gas transportation service, and for natural gas supplies to the extent that OG&E does not already procure natural gas on a competitively bid basis, within one year rather than in the three years to which OG&E has committed in the Stipulation. The Commission, having considered the arguments of the parties regarding the time for competitive bidding, finds that the position advocated to ONG and GPM is not supported by the evidence and should therefore be rejected. The Commission

further finds that the three year timeframe established by the Joint Stipulation for competitively bidding OG&E's transportation service for natural gas is fair, just, and reasonable and supported by the evidence in the record.

Mr. Coffman testified on behalf of the Company that in order to maintain a reliable supply of electricity to OG&E's customers, OG&E would need adequate time to evaluate the integration of the Company's generating stations using diverse rather than a single natural gas transportation system. The testimony before the Commission with respect to the Company's integrated fuel management system, the need for the Company to provide reliable electric service, the savings which OG&E's customers have already experienced as a result of the Company's fuel cost reduction efforts, and the Company's commitment to have competitively bid natural gas transportation services in place not later than April 30, 2000, all support a finding, and the Commission finds that paragraph 4 of the Joint Stipulation and Settlement Agreement is fair, just and reasonable.[14]

The Commission further finds that the rate reduction set forth in the Stipulation represents a balance of the competing interests of all of the Company's classes of customers. In that connection the Commission notes that all of the Company's classes of service were represented by the signatories to the Stipulation. The Commission specifically finds that while cost of service should be considered, it should not be the sole determinant in determining rates which are fair, just, and reasonable and in the public interest. Included among the factors which this Commission also considers in designing rates are customer impact, social considerations and environmental matters. The Commission finds that the rate design proposed in the Stipulation

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[14] The testimony of Don R. Rowlett (Tr. Jan. 14, 1997, pgs rk-59 - rk-64), Dr. Jay C. Lukens (Tr. Jan. 15, 1997, pgs ja-125 - ja-131 and ja-170 - ja-172), and David Brammer (Tr. Jan. 15, 1997, pgs lw-172 - lw-188). The Commission also takes judicial notice of Order No. 380443.

represents an appropriate recognition of cost of service as well as these other factors. The Commission notes particularly that the rate reduction to the residential and all other classes is appropriate and justified as consistent with the goal of this Commission to provide the citizens of Oklahoma with reasonable rates for utility services. The Commission further finds that the Chain Account Aggregation Rider and the load curtailment riders outlined in the Stipulation and as further explained by Staff witness, Mr. Brammer, and Company witness, Mr. Wylie, are fair, just and reasonable and are fully supported and cost justified.[15] Furthermore, intervenor Trigen has presented this Commission with no evidence to support its assertion that the tariffs proposed for these riders contain provisions which are unduly discriminatory on their face. Therefore, the Commission finds that the specific relief requested by Trigen is not supported by substantial evidence. Notwithstanding this finding, however, as will be reflected below, the Director, Public Utility Division for this Commission, shall provide all parties to this proceeding with an opportunity to review the final tariffs implementing the Stipulation before they are accepted for filing.

The Commission, therefore, finds that the revenue requirement and rate design approved herein are fair, just and reasonable and in the public interest and that the Stipulation represents a fair, just and reasonable settlement of all of the issues which were raised related to this proceeding, the terms and conditions of the Stipulation are in the public interest, and said terms and conditions are supported by substantial evidence.

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[15] Testimony of David Brammer (Tr. Jan. 22, 1997, pgs bwm-34 - bwm-45) and William L. Wylie (Tr. Jan. 13, 1997, pgs bwm-18 - bwm-61).

ORDER

IT IS THEREFORE THE ORDER OF THE COMMISSION that the Stipulation attached hereto as Attachment A should be and the same is hereby approved in all respects, and OG&E is hereby authorized and directed to file appropriate tariffs with this Commission and to do all things necessary to implement the Stipulation; and that the Company should be and is hereby authorized to rebase its Fuel Cost Adjustment tariff consistent with the findings made herein.

IT IS FURTHER ORDERED that the annual compensation to be paid to ENOGEX by OG&E for natural gas transportation service to the Company's electric generating stations as set forth in the Stipulation is fair, just and reasonable, and that the Applicant is hereby authorized and directed to recover such costs from its Oklahoma jurisdictional customers in the same manner as set forth in the Stipulation.

IT IS FURTHER ORDERED that OG&E shall provide the Director of Public Utility Division, with appropriate tariffs implementing the provisions of this Order along with appropriate proof of revenues. After providing all parties to this proceedings an opportunity to examine the Company's proposed tariffs and to provide informal written comments to the Director with respect thereto, and upon determination by the Director that such tariffs conform to the terms, conditions and provisions of this Order, the Director shall advise the Commission that the tariffs recommended for approval by the Director conform to the terms, conditions and provisions of this Order. If the Commission determines upon its review that the tariffs recommended for approval by the Director conform to the terms, conditions and provisions of this Order, the Commission will issue and order directing that such tariffs be accepted for approval by the Public Utility Division and such tariffs will be effective with OG&E's first

billing period in the month of March, 1997.

CORPORATION COMMISSION
OF OKLAHOMA

/s/ CODY L. GRAVES, CHAIRMAN

Concurring Opinion Attached
/s/ BOB ANTHONY, VICE CHAIRMAN

/s/ ED APPLE, COMMISSIONER

DONE AND PERFORMED this 11th day of February, 1997.

BY ORDER OF THE COMMISSION:

/s/ CHARLOTTE W. FLANAGAN, Secretary

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF OKLAHOMA GAS AND ELECTRIC COMPANY FOR AN ORDER OF THE COMMISSION AUTHORIZING APPLICANT TO MODIFY ITS RATES, CHARGES AND TARIFFS FOR RETAIL ELECTRIC SERVICE IN OKLAHOMA	))))))))))	CAUSE NO. PUD 960000116

CONCURRING OPINION OF
COMMISSIONER BOB ANTHONY

I concur with the Commission decision to accept a stipulated rate reduction because the settlement agreement allows the Commission to immediately initiate another case (1) seeking a further rate reduction and (2) making changes in the punitive and discriminatory provisions of today's order. Also, testimony suggests ratepayers could potentially benefit by more than $100 million in savings from reduced gas transportation expenses if OG&E considers alternatives to self-dealing with its affiliate Enogex, Inc. for transportation of gas. Therefore, this Commission can still quantify the potential benefits available to OG&E and its customers of basing gas transportation decisions on economic efficiency instead of favoritism. For example, the Commission can determine the benefits OG&E should derive from using competitive bidding for transportation of gas to its generating units and incorporate these savings into electric rates on a more accelerated basis than required by this order.

Legal Requirements for a "Black Box Settlement"

During the proceedings, I advised the parties of my concern that the record needed to meet certain legal requirements for a commission dealing with a "black box settlement." Mere statements by witnesses that a stipulated agreement is "fair, just, and reasonable" do not constitute a valid basis for adopting a proposed settlement.

The Kansas and Missouri matters I had mentioned to the parties set forth arguments and decisions which may have bearing on today's order of the Oklahoma Corporation Commission. For example, on October 15, 1996, the Citizens' Utility Ratepayer Board filed a brief before the Kansas Corporation Commission (KCC) in Docket No. 193,787-U stating:

> "Black Box" settlements are unlawful and provide no reasonable basis on which the Commission can make the requisite determinations of (1) rate base, (2) a fair rate of return, and (3) reasonable operating expenses, as required in any contested rate investigation. See, Southwestern Bell Tel Co V State Corporation Commission 192 Kan 39, 46-47, 609 P2d 1157 (1980). The Commission should accordingly reject the stipulation and agreement dated October 1, 1996, because it fails to impart sufficient information or evidence to base a determination.

Similar arguments were presented to the KCC through briefs filed by Kansas Industrial Consumers on September 13, 1996 and Farmland Industries, Inc., on September 13, 1996 in Docket Nos. 193,306-U and 193,307-U. Furthermore, on September 7, 1995 in State of Missouri v Public Service Commission of the State of Missouri (Case No. CV194-1441CC) the Circuit Court of Cole County, as a conclusion of law, stated:

when it entered into the "Settlement Agreement" it acted unlawfully and in total disregard for the administrative system established for PSC actions, in that this decision was not supported by substantial and competent evidence upon the whole record, but rather was made arbitrarily and capriciously without any evidentiary basis

I am concerned that the findings and conclusions of today's order regarding revenue requirements, rate design and other matters involving regulatory policy are not supported by substantial evidence in the case record. I believe because the rate reductions ordered by the Commission in this cause are not based upon evidentiary findings regarding rate base, reasonable operating expenses, and a fair rate of return that the conclusions could be found arbitrary and capricious if contested by a party to the proceedings. In other words, I believe today's "black box settlement" could be found unlawful if challenged, and I believe punitive and discriminatory provisions, such as those affecting Trigen, should not have been presented to the Commission on a "take-it or leave-it" basis.

However, I concur in accepting the rate decrease ordered herein because it will benefit the ratepayers of OG&E and the economy of Oklahoma. Yet, I regret that larger benefits may have been possible upon a more thorough presentation of evidence before the Commission.

The closing arguments of the Oklahoma Attorney General speak volumes when they state, ". . . taking into account the likely outcome of litigation in the absence of the stipulation[,] we believe that on that basis the stipulation constitutes a fair, just, and reasonable resolution of this case . . ." (January 23, 1997, Tr. 29). What does the Attorney General mean when referencing "the likely outcome of litigation"? In Order No. 380443 issued by a 2-1 vote of the Commission on [illegible] February 25, 1994 the outcome of

litigating the last major OG&E rate case was determined. Over my dissent, Commissioner Graves and Watts ordered a $24.0 million annual rate reduction. This 1994 order showed the Attorney General its recommended rate reduction of $52.0 million and the $71.1 million rate reduction recommended by the Commission's own staff were largely rejected by the Commission. In the current rate case the Attorney General agrees to a stipulated $50.7 million rate reduction (which goes to $55.7 million for the second and third years) despite the $96.852 million rate reduction supported by the testimony of the Attorney General's own witness on January 21, 1997 (Tr. 151) and despite the $94.5 million rate reduction recommended by the audit of the Commission's Public Utility Staff.

The Integrity of the Commission's Hearing Process

On June 18, 1996 the Attorney General filed an emergency application (Cause No. PUD 960000167) expressing his concern about restoring "the confidence of the public in the Commission's ratemaking proceedings..." The application stated, "Upon information and belief, the integrity of the Commission's hearing process continues to be subverted today by ... *ex parte* communications..." Although the Commission has not adopted new rules prohibiting *ex parte* communication, there currently are Oklahoma Rules of Professional Conduct which pertain to lawyers (O.S. Title 5, Chapter 1, Appendix 3A). Rule 3.5 states, "A lawyer shall not ... seek to influence a judge ... or other decision maker ... of a tribunal ... in an adversary proceeding, communicate or cause another to communicate as to the merits of the cause, with a judge or an official before whom the proceeding is pending ..." Rule 3.6(a) states, "A lawyer shall not make, participate in making, counsel or assist another person to make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the

lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding, including an administrative proceeding."

The public comment file of this rate case shows a letter-writing campaign was conducted largely on behalf of the Company's position. I believe the Attorney General is concerned about improper conduct in deciding utility cases, and he should consider initiating an examination of the conduct of the attorneys representing OG&E in this case. Did Mr. H. D. Binns, Jr. and Mr. Robert D. Stewart, Jr. condone, direct, or know of efforts by OG&E personnel initiating or facilitating a letter-writing campaign intended to influence the commissioners who would decide their case? I personally received over one hundred letters in support of the Company. A few individuals who wrote letters also personally told me of either receiving correspondence as a shareholder or being solicited to write commissioners by an OG&E community service representative. Counsel for OG&E chose not to respond to a request for an explanation as set forth on December 12, 1996 in a letter from the Commission's Deputy General Counsel. Also, on January 6, 1997 during the proceedings of this case before the Commission en banc (Tr. 43), Vice-Chairman Anthony asked OG&E's General Counsel, Mr. Binns, "...do you have any reason to believe that OG&E had its employees or agents or officers or lobbyists solicit letters to be written to the Commissioners?" In response, Mr. Binns stated, "... I would respectfully decline to respond to that question."

In my Dissenting Opinion of March 14, 1994, filed in response to Order No. 380443 and attached hereto, I set forth concerns about improper conduct by representatives of OG&E in the last major rate case. Someone needs to address a situation which apparently continues to exist.

Respectfully submitted this 11th day of February, 1997.

/s/ Commissioner Bob Anthony

APPENDIX B

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF OKLAHOMA GAS AND ELECTRIC COMPANY FOR AN ORDER OF THE COMMISSION AUTHORIZING APPLICANT TO MODIFY ITS RATES, CHARGES AND TARIFFS FOR RETAIL ELECTRIC SERVICE IN OKLAHOMA	))))))))))	CAUSE NO. PUD 960000116

BRIEF IN SUPPORT OF MOTION IN LIMINE

INTRODUCTION

On July 24, 1996, Trigen-Oklahoma Energy Corporation ("Trigen") filed its Motion to Intervene[1] in the captioned proceeding. As justification for its intervention, Trigen alleged:

> "As a significant industrial customer on the OG&E system, Movant is interested in any proceedings in this cause which may affect the rates charged to industrial and commercial customers by OG&E."[2]

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[1] On November 8, 1996, Trigen filed a "Clarification of Record" which served to correct the original Motion to Intervene to reflect that the Motion "should have stated that Intervenor Trigen-Oklahoma Energy Corporation's wholly owned subsidiary is an industrial customer on the system of Oklahoma Gas and Electric Company."

[2] Motion to Intervene, ¶2(b)[.]

The Commission granted intervenor status to Trigen on this basis, without objection by OG&E, in its Order No. 404252. On October 10, 1996, Trigen filed its List of Major Issues, which filing is a prerequesite [*sic*] to the filing of testimony and exhibits pursuant to OAC 165:5-7-61(f). Thereafter, on October 15, 1996, Trigen filed a Statement of Position, the effect of which was to advise the parties that Trigen **did not** intend to file testimony or exhibits pursuant to OAC 165:5-7-61. Trigen did not file testimony of any witness addressing the specific issues relevant to Trigen's intervention; nevertheless, on November 18, 1996, Trigen filed an Exhibit List in violation of OAC 165:5-7-61(f)(2).[3] Since Trigen failed to file testimony pursuant to OAC 165:5-7-61(f)(1), the Commission's Rules do not permit the filing of a List of Major Issues to be addressed by the intervenor's witness(es). Since Trigen failed to sponsor a witness in this cause, Trigen's Exhibit List and List of Major Issues should be disregarded by the Commission in examining Trigen's standing in this case.

Trigen's Statement of Position makes it clear that Trigen's intention in these proceedings is to protect its interest as a claimed competitor of OG&E rather than as OG&E's customer. As will be demonstrated below, while Trigen has standing to address the appropriateness of the rate which OG&E intends to charge Trigen for electric services consistent with the Final Order issued by the Commission in these proceedings, Trigen has no standing to have this Commission address the competitive relationship, if any,

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[3] OAC 165:5-7-61(f)(2) provides: "The Commission Staff, the Attorney General and any intervening party of record shall provide to the utility, thirty (30) days prior to filing responsive testimony, a list of any major issues the party anticipates to raise in connection with the utility's application for a general rate change. Said list of anticipated major issues shall be updated, as necessary, up to five (5) days prior to filing responsive testimony."

between OG&E and Trigen in the marketplace. Furthermore, the Commission lacks jurisdiction to adjudicate a private matter between OG&E and Trigen; the Commission's jurisdiction is expressly limited under Oklahoma law, and private disputes must be litigated in the district courts.

ARGUMENT

Proposition 1: The Commission lacks jurisdiction to adjudicate issues involving private rights.

The Corporation Commission is a constitutionally created agency possessing legislative, executive and judicial powers,[4] but the Commission possesses only such power and authority as has been granted to it by the Constitution and Statutes.[5] The jurisdiction and authority of the Commission is limited to that which has been expressly or by necessary implication conferred upon it by the Constitution.[6] It is well settled in Oklahoma law that the Commission has no power or authority to settle disputes of a private nature. In *Smith et al. v. Corporation Commission et al.*, 101 Okl. 254, 225 P. 708 (1924) the Oklahoma Supreme Court reversed a decision of the Commission awarding attorneys' fees in a case against Oklahoma Gas and Electric Company brought by certain customers for the failure of the Company to maintain adequate natural gas pipeline pressure to serve the customers. In defining the power and authority of the Commission, the Court held at page 256:

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[4] See *Continental Tel. Co. of Oklahoma v. Hunter*, 590 P.2d 667, 668 (Okl. 1979).

[5] Id.

[6] *St. Louis-San Francisco Ry. Co. v. State*, 268 P.2d 845 (Okl. 1954).

> It has jurisdiction to supervise, regulate, and control public utilities, in so far as their public duties are concerned, and to establish rates to be charged by them for a public service, and if rates in excess of those established are collected, it has the authority to adjust controversies between the utility and the consumer by determining the amount of refund due the consumer, and to whom the same should be paid, and it may enforce the payment of such overcharge in the same manner that fines and penalties imposed by it are authorized to be collected by law, and when such overcharge is collected, it shall be by the commission paid to the parties to whom it is due. Its jurisdiction is limited to those controversies wherein the rights of a public utility and the patrons thereof are involved. **It has no power or jurisdiction to adjudicate differences between private litigants or purely private matters between a utility and a citizen.** (Emphasis added).

The Court went on to state that the Commission has no power to fix or decree a lien upon the funds in its hands belonging to the patrons or to fix the amount of an attorney's fee that should be paid by either the consumer or the utility or to determine controversies between attorney and client.

In *Chicago, R.I.&P. Ry. Co. v. State et al.,* 158 Okl. 57, 12 P.2d 494 (1932), the Court quoted the above language from the *Smith* case and at pages 59-60 went on to state:

> In the above decision this court held that the Corporation Commission had jurisdiction as to all matters where the public and the utility were involved, **but that the Corporation Commission had no power or jurisdiction to adjudicate differences which are purely private between a utility and a citizen.** The line of demarcation being that so long as the matter in

> controversy is one that affects the public, then the Corporation Commission would have jurisdiction to consider the same, **but where said matter in controversy is a private matter merely between the company and the individual then the same becomes a private matter between the corporation and the individual and not a public concern and not being of public concern, the Corporation Commission does not acquire jurisdiction thereof.** (Emphasis added).

In *Central States Power & Light Corp. v. Thompson et al.*, 177 Okl. 310, 58 P.2d 868 (1936), Thompson brought an action in the District Court alleging the defendant utility had sold natural gas to Thompson's cleaning and pressing plant under the utility's residential tariff instead of its industrial tariff and seeking a refund of overpayments to the utility for a period of three years. The utility asserted *inter alia* that since its tariffs were fixed by the Oklahoma Corporation Commission, the Commission had exclusive jurisdiction over the cause of action. On appeal, the Court followed its decision in the *Smith* and *Chicago, R.I.&P.* case, quoting at length from the latter case, and finding that the District Court had both personal and subject-matter jurisdiction.

The Court has consistently applied the private action standard of the Smith Case to hold that the Commission has no jurisdiction to litigate private disputes in the absence of specific statutory authority to the contrary.[7] Thus, in 1939, the Court determined that the *Smith* line of cases did not apply where the Commission had been granted legislative authority to settle disputes arising between lessees of oil and gas drilling and spacing units.[8] Similarly, the Commission has exclusive jurisdiction by virtue of its statutory authority

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[7] See *Russell v. Walker et al.*, 160 Okl. 145, 15 P.2d 114.

[8] *Croxton et al. v. State et al.*, 186 Okl. 249, 97 P.2d 11.

to determine refunds where a public utility charges its patrons in excess of the lawful rate in force at the time a charge is made or which should have been applied to the service rendered in the absence of an approved contract or tariff.[9] Conversely, in *Southwestern Light & Power Co. v. City of Elk City,* 188 Okl. 540, 111 P.2d 820 (1941), the Court held that "(w)hile the Corporation Commission has complete authority and jurisdiction in rate-making cases to fix utility rates, and in proper cases may order refund of excessive rate collections over the legal rate, there is no authority to construe contractual rights . . . ."[10]

In *Gibson v. Elmore City Telephone Company,* 411 P.2d 551 (Okl. 1966), the District Court dismissed a case involving a dispute over the division of toll revenues collected for the transmission of messages over the lines of both utilities for lack of subject matter jurisdiction. The Supreme Court reversed and remanded to the District Court holding that the litigation involved solely a dispute between two private concerns over the division of toll charges. At page 553 the Court said:

> It is not contended that the rates charged were in excess of the rates fixed by the Corporation Commission. The Corporation Commission **has no jurisdiction over a controversy between two private concerns.** Such controversy can be adjusted only in a suit between the parties in a court of competent jurisdiction. (Emphasis added).

Cases determining that the Commission has no jurisdiction

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[9] *State ex rel. Hales v. Public Service Co. et al.,* 187 Okl. 182, 102 P.2d 139 (1940).

[10] 188 Okl. at 541-542. See also, *St.Louis-San Francisco Ry. Co. v. State, supra, at footnote 6.*

to determine a private right of action are not limited to contract or property law. The Court has also held that the Commission has no jurisdiction to try an action for damages[11] or for tortious or negligent conduct.[12] Neither does the Commission have jurisdiction to enforce a private cause of action granted by statute.[13] Since the Commission is not a court of general jurisdiction, it has no authority to enter a money judgment against any party.[14] Where a matter is a private concern between a public utility and one of its patrons, the courts and not the Commission have jurisdiction to determine the controversy.[15]

In this proceeding, Trigen attempted to have this Commission address issues currently pending before the United States District Court between Trigen and OG&E. Subsequently, that attempt was withdrawn on the record by counsel for Trigen.[16] Notwithstanding the withdrawal of those issues by Trigen, Trigen continues to advocate that the Commission should somehow prohibit anticompetitive behavior *in futuro*. Based upon the Commission's

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[11] *Kingwood Oil Company v. Hall-Jones Oil Corporation,* 396 P.2d 510 (Okl. 1964); *Merritt v. Corporation Commission,* 438 P.2d 495 (Okl. 1968).

[12] *Continental Tel. Co. of Oklahoma v. Hunter,* 590 P2d 667 (Okl. 1979).

[13] See *Burmah Oil & Gas Company v. Corporation Commission,* 541 P.2d 834 (Okl. 1975) where the Court granted a writ of prohibition enjoining the Commission from issuing an order requiring Burmah Oil & Gas Co. to furnish a landowner gas service pursuant to statute.

[14] *Fent v. Oklahoma Natural Gas Co.,* 804 P.2d 1146 (Okl. App. 1990); *Lear Petroleum Corp. v. Seneca Oil Co.,* 590 P2d 670 (Okl. 1979).

[15] See *Gibson, supra,* at page 554; see also *Thompson, supra.*

[16] Application of Oklahoma Gas and Electric Company, Cause No. PUD 960000116, Transcript of Proceedings, January 6, 1997, pgs 13, 14.

constitutional and statutory authority as construed by the Supreme Court, the Commission is without jurisdiction to determine or adjudicate the private dispute between Trigen and OG&E now pending in the federal District Court, and the Commission is equally without jurisdiction to entertain allegations of anticompetitive practices which might occur now or in the future.

While there are no reported cases in Oklahoma involving a private dispute based upon antitrust law principles, the Ohio Supreme Court was presented with a persuasive case in 1982 where anticompetitive practices were alleged at the Ohio Public Service Commission against a telephone company. In *ARMCO, Inc. v. P.U.C. of Ohio, et al.*, 23 O.O.3d 361, 433 N.E.2d 923, Ohio Bell Telephone Company sought and the P.U.C. permitted the company to implement flexible rate tariffs. The Privately Owned Telephone Suppliers Association appealed contending *inter alia* that the P.U.C. "erred in refusing to consider the anticompetitive intent and effect of the . . . tariffs."[17] **The Ohio Supreme Court concluded that it is not the function of the P.U.C. to administer antitrust laws, "but rather to fulfill its statutory duty, to protect utility customers from unjustly discriminatory rates . . . "The Court found that the Ohio Commission "is without jurisdiction to entertain allegations of anticompetitive practices** unless the statutory conditions precedent, 'free service or service for less than actual cost' obtain."[18]

Proposition 2: **Trigen lacks standing to assert a private claim against OG&E in this proceeding.**

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[17] 433 N.E.2d at 929-930.

[18] Id.

Trigen was granted intervenor status as a member of a customer of OG&E, and in that capacity Trigen has standing to inquire with respect to the effect which OG&E's proposed rates, charges, and terms and conditions will have on Trigen as a member of the class. Trigen does not have standing, however, to assert a private claim or dispute it may allege to have against OG&E; neither does it have standing to assert the possibility that OG&E's rates, charges, or terms and conditions of service might be administered by the Company in a manner which Trigen asserts would be anticompetitive.

Public utility law does not recognize nor does it grant standing to competitors to complain about the indirect effects of utility rates on their business. In *Pennsylvania Petroleum Association v. Pennsylvania Power & Light Company,* 412 A.2d 522, 524 (Pa. 1980), the Court stated as follows:

> "A customer claiming that a utility rate is in excess of what will give a fair return may seek to have it lowered. The seller of a competing product cannot force the utility to raise rates that it alleges are detrimental to its competitive position, as protection of such an interest is not an objective of the regulatory scheme." Citation omitted.

See also, *Crown American Corporation v. Pennsylvania Public Utility Commission,* 463 A.2d 1257, 1260 (Pa. Cmwlth. 1983). ("Crown's argument is untenable as a basis for the rejection of Rule 5F. Any economic disadvantage which may be the result of the Rule is not unreasonable, because the protection of Crown's economic interests and competitive position, and of those similarly situated, is neither an objective of Section 1502, nor of the regulatory schedule of the [Public Utility] Code in general. See, *Pennsylvania Petroleum Association v. Pennsylvania Power & Light Company,* 488 Pa. 308, 412 A.2d 522 (1980)."

CONCLUSION

By its own admission as justification for its intervention (found in first paragraph of this Introduction) Trigen has no standing to assert actual or possible private causes of action against OG&E in this proceeding. By law, the Commission has no jurisdiction to entertain allegations of a private nature in the context of a proceeding to determine the prospective rates of a regulated utility. Therefore, Trigen should be prohibited from raising any issues in the form of cross-examination questions herein which go beyond its standing to address the effect which OG&E's proposed rates, charges, and terms and conditions of service would have on Trigen **as a member of a customer class of OG&E**.

Respectfully submitted,
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